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(4)

In the

Supreme Court of the United States

CHEVRON U.S.A., INC.,

Petitioner,

v.

MARIO ECHAZABAL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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25 pp

QUESTION PRESENTED

Whether a person who is unable to carry out the essential functions of a job without incurring significant risks to the person's own health or life is a "qualified individual" who satisfies "qualification standards" for that job within the meaning of the Americans with Disabilities Act.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) and California Manufacturers and Technology Association respectfully submit this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent for amicus participation in this case was granted by counsel of record for all parties.

Amicus PLF is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF has participated in numerous cases before this Court concerning statutory interpretation of federal laws in cases raising significant public interest concerns, such as *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), and *Jones v. United States*, 529 U.S. 848 (2000).

PLF seeks to augment the arguments of Petitioner by further illustrating how public policies will be affected by the outcome of this litigation. PLF believes its public policy perspective and litigation experience will provide a unique viewpoint on the issues presented in this case and that this additional viewpoint will aid the Court in evaluating the merits of this petition.

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae Pacific Legal Foundation and California Manufacturers and Technology Association affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Amicus California Manufacturers and Technology Association (CMTA) is a mutual benefit, nonprofit, nonpartisan corporation established in 1918 to effectuate communication between its members and state policymakers and the courts about issues that affect the interests of manufacturers. The membership of CMTA includes more than 700 companies that employ approximately 70% of the manufacturing workforce in California.

CMTA believes the decision of the court below adversely affects the interests of its members by discounting their legitimate—and law enforced—policies regarding worker safety. CMTA believes it is critical for this Court to clarify the standards under which employers may consider safety-based job qualifications in the implementation of the ADA.

STATEMENT OF THE CASE

Respondent Mario Echazabal was an employee of a company called Irwin Industries, Inc., which did subcontract work for Chevron at its coker plant in El Segundo, California. *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1065 (9th Cir. 2000). In 1992, Echazabal applied for a job as a plant helper directly with Chevron. Chevron tendered an employment offer to Echazabal contingent upon his passing the company's physical exam. *Id.* The physical exam revealed that Echazabal had a liver abnormality. *Id.* Because the plant helper position in the coker plant would expose Echazabal to liver-toxic chemicals that could further damage his liver or, in the event of an accident, fatally injure him, Chevron withdrew its offer. *Id.* Nonetheless, Echazabal continued to work for the subcontractor at the Chevron plant. *Id.* Subsequently, doctors diagnosed Echazabal as having chronic active hepatitis C. *Id.*

In 1995, Echazabal again applied for a job directly with Chevron. *Id.* Again, Chevron tendered an offer contingent upon the results of a medical exam. *Id.* And again, the exam revealed Echazabal's liver problems. *Id.* Accordingly,

Chevron withdrew its offer of employment and, further, requested Echazabal's employer, Irwin Industries, to remove Echazabal from the coker plant and find him a position where he would not be exposed to liver-toxic chemicals. *Id.* Consequently, Echazabal lost his position at the refinery. *Id.* As a result of these actions, Echazabal filed a complaint with the Equal Employment Opportunity Commission (EEOC), and this suit followed. *Id.*

Echazabal's suit against Chevron and Irwin Industries raises various issues. Relevant to the petition, however, is only one issue: Echazabal's claim under the Americans with Disabilities Act (ADA) against Chevron. Chevron defended its actions by asserting that Echazabal was not a "qualified individual with a disability" within the terms of the ADA, and, alternatively, that it was justified because the job would pose a "direct threat" to Echazabal's health. *Id.* at 1066. The district court granted summary judgment for Chevron. *Id.* at 1065.

On appeal, the Ninth Circuit, in a 2-1 decision, reversed. *Id.* at 1072. The Ninth Circuit first held that, under the ADA, it was not a defense to liability that a job would pose a threat to the health of the disabled individual; rather, the only rationale on which an employer could justify itself under the "direct threat" defense was if the disabled individual would create a threat to the health or safety of other individuals. *Id.* at 1069. Second, it held that the physical exam requirements of the plant helper job were not legitimate job "qualification standards" within the meaning of the ADA, because the ability to withstand the effects of liver-toxic chemicals was not an "essential function" of the plant helper position. *Id.* at 1070-71.

Chevron has filed a Petition for Writ of Certiorari to resolve a conflict in the circuits as to whether health conditions can render an individual not a "qualified individual with a disability" for a job (such that the person may not state an ADA claim) and whether threats to the disabled individual, as

opposed to others only, constitute a valid basis for employment decisions under the ADA.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act is well-intentioned, but it is one of the most unwieldy laws ever passed by Congress. Title I of the ADA, which governs discrimination in the employment context, was intended to eliminate barriers to employment for disabled individuals where those disabilities reasonably could be accommodated in order to integrate disabled individuals into mainstream economic life. The Act's promises, however, have not been easy for employers to fill despite their best intentions and efforts. The provisions of the Act are open to so many varying interpretations that employers have been confronted with a minefield of pitfalls and traps in their attempts to navigate the Act's requirements. The pitfall in this case lies in determining when an employer may properly consider safety-related concerns in establishing job qualifications.

In the decision below, the Ninth Circuit limited the employer's ability to consider safety-related qualifications to situations where employing an individual with a disability will present a direct threat not to the disabled individual himself, but to third parties or, alternatively, where the safety standard could be said to constitute an "essential function" of the job in question. In contrast, other courts of appeals have allowed employers to apply safety-related standards where the standard is merely "job-related." In this case, Petitioner's liability rests squarely upon the difference between these standards. This Court should grant the Petition for Writ of Certiorari to resolve this conflict and to define when safety-related qualifications may properly be considered by employers in their employment decisions.

This case also presents a narrower question of whether employers may consider the safety of disabled individuals when

making employment decisions. Under the Ninth Circuit's holding, employers may not be solicitous of the welfare of disabled individuals; rather, employers must simply allow disabled individuals the option of risking their own health and safety, notwithstanding common sense, ethics, or the many government policy edicts that encourage, if not outright demand, that employers take steps to minimize employee casualties where those risks are known and quantifiable. The Ninth Circuit's holding does nothing to further the laudable goals of the ADA, and this Court should grant the Petition for Writ of Certiorari to establish reasonable boundaries to the scope and reach of the ADA's liability provisions.

ARGUMENT

I

THIS COURT SHOULD GRANT THE PETITION TO PROVIDE GUIDANCE TO EMPLOYERS ON HOW THE AMERICANS WITH DISABILITIES ACT DISTINGUISHES BETWEEN LEGITIMATE SAFETY CONCERNS AND IMPERMISSIBLE DISCRIMINATION

> Fears that the ADA is too vague or too costly and will lead to an explosion of litigation are misplaced. . . . [W]herever possible, existing language and standards from the Rehabilitation Act were incorporated into the ADA. . . . Employers can turn to these interpretations for guidance on how to meet their obligations under the ADA.

Statement by President George Bush upon Signing S. 933, 26 Weekly Comp. Pres. Doc. 1165 (July 30, 1990), *reprinted at* 1990 U.S.C.C.A.N. 601. Despite the assurances of President Bush, it is clear that the terms of the ADA have not been as readily comprehensible to employers—or to courts, for that matter—as he surmised. Indeed, this Court has already felt compelled by disagreements in the federal circuits to resolve

important questions, such as whether disabilities must be determined with or without reference to corrective measures, *see Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), *Murphy v. United Parcel Service*, 527 U.S. 516 (1999), and whether an application for disability benefits precludes an ADA claim. *Cleveland v. Policy Management Systems Corporation*, 526 U.S. 795 (1999). And, on April 16, 2001, this Court granted petitions for writ of certiorari in two additional cases arising under the ADA to resolve additional conflicts in the circuits. *Toyota Motor Manufacturing v. Williams*, *cert. granted*, 69 U.S.L.W. 3670 (2001), and *U.S. Airways, Inc. v. Barnett*, *cert. granted*, 69 U.S.L.W. 3670 (2001). This case presents another question upon which the federal circuit courts of appeals have arrived at conflicting decisions, and a case where the rule announced by the court below conflicts directly with regulations adopted by the Equal Employment Opportunity Commission, the federal agency charged with enforcing the provisions of Title I of the ADA. *See* 42 U.S.C. § 12116 (1999). Accordingly, review by this Court is appropriate to resolve when employers may appropriately consider safety qualifications in filling jobs with disabled individuals under Title I of the ADA.

In the decision below, the Ninth Circuit framed the issue narrowly: whether the "direct threat" defense to liability under the ADA is available to employers where a job presents a direct threat to the health or safety of the disabled individual himself but not to others. *Echazabal*, 226 F.3d at 1064. As demonstrated by the question presented in the petition, however, this case has broader implications on how employers must construe their obligations under the Act when confronted with the vast array of conditions which have been held by courts to constitute "disabilities" protected by the Act. Indeed, the court below, by framing the "direct threat" question as the only relevant question in this case, rejected less-restrictive interpretations of the Act adopted by other courts of appeals and

concomitantly has opened the door to broader entitlements under the ADA for a large variety of individuals with varying medical conditions. As a result, the decision below leaves employers guessing as to when they may properly take medical conditions into account when filling jobs that carry with them known health or safety risks.

While the ADA is fairly straightforward in its overall scheme, the devil is, of course, in the details of how its broad and amorphous terms are supposed to be construed when confronted with the realities of employment decisionmaking. Put simply, Title I of the ADA prohibits employers from discriminating against a "qualified individual with a disability" if the job in question may be performed by the disabled individual with or without reasonable accommodation. 42 U.S.C. § 12112(a) (2001). While this proscription is eminently understandable in the context of, for example, a blind telemarketer, it is not so easy to comprehend or apply in other contexts. First, the term "disability" is given a remarkably broad and vague definition under the Act:

> (2) The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (2001). As this Court pointed out in *Sutton*, there is no precise meaning of what physical or mental conditions may constitute a "disability." *Sutton*, 527 U.S. at 479. Further, in order to be protected by Title I of the ADA, an individual must not only be "disabled," but "qualified." A "qualified individual with a disability"

> means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential . . . .

42 U.S.C. § 12111(8) (2001).

In this case, Respondent has chronic active hepatitis C. It is generally acknowledged that this is a serious illness; however, as the Ninth Circuit noted, Mr. Echazabal has been performing the job denied by Chevron for a number of years under the aegis of a subcontractor. *Echazabal*, 226 F.3d at 1072. Nonetheless, Mr. Echazabal's illness was the disqualifying factor in Chevron's employment decision. Chevron disqualified Mr. Echazabal from the plant helper position by virtue of his acute sensitivity to the liver-toxic chemicals to which he would be exposed in that job.

Chevron contended that its hiring decision was defensible under the ADA. It defended its decision by invoking Section 12113, Subsection (a), which states:

> It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.

42 U.S.C. § 12113(a) (2001). Further, EEOC regulations explain:

> Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, *safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired.*

29 C.F.R. § 1630.2(q) (2001) (emphasis added). Relying upon these provisions, Chevron asserted that the physical exam requirement, under which the company required that an employee meet specific health criteria, was justifiable. Chevron contended that the ability to withstand acute health risks was job-related and, therefore, Mr. Echazabal was not qualified for the plant helper position. Under Chevron's reading of the Act and EEOC regulations, employers have some leeway as to what they consider the requirements of a job in question. Employers, they argued, may thus deny employment to a disabled individual if that individual does not meet job-related safety requirements.

But the Ninth Circuit rejected the notion that health conditions related to worker safety could disqualify a disabled individual. Rejecting Chevron's reading of Section 12113(a), the court instead focused on Subsection (b), which provides:

> The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

42 U.S.C. § 12113(b) (2001). Notwithstanding the general language of Section 12113(a), the court relied upon this single statutory provision as the sole means by which Chevron could defend its decision. The court construed the Act such that employers may only disqualify disabled individuals for safety-related concerns when an individual poses a "direct threat" to third parties. Furthermore, the court construed this provision narrowly and hypertechnically, holding that, despite the

precatory phrase "may include," the Act precluded employers from using the "direct threat" defense in situations where a job condition might pose a "direct threat" to the disabled individual himself.[2] *See* 29 C.F.R. § 1630.2(r) (2001). This holding, and the way in which the Ninth Circuit arrived at it, raises several issues that conflict with the decisions of other federal circuits and which call for further clarification from this Court.

As this Court noted in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569, and 569 n.15 (1999), it is not clear whether the EEOC's (and the Ninth Circuit's) contention that the "direct threat" provision of the Act as the sole means of defense to liability for safety-related concerns is a correct reading of the Act. That is, Section 12113(a) generally speaks of qualification standards that are merely "job-related," while Subsection (b) additionally provides specifically that employers may disqualify disabled individuals who present "direct threats." As the EEOC interprets these provisions, (a) and (b) are conflated so that safety concerns may only apply under the "direct threat" defense. *Kirkingburg*, 527 U.S. at 569. While the Ninth Circuit accepted this interpretation, other circuits have rejected it.

For example, the Fifth Circuit, in *Equal Employment Opportunity Commission v. Exxon Corporation*, 203 F.3d 871 (5th Cir. 2000), held that "safety requirements are not exclusively cabined into the direct threat test." *Id.* at 873. At issue in *Exxon* was the validity of a policy in which Exxon

[2] Ironically, the Ninth Circuit accepted EEOC's interpretation that Subsections (a) and (b) of Section 12113 are conflated so that safety-based qualifications are only valid if they fall under the "direct threat" defense, while at the same time rejecting EEOC's interpretation that the "direct threat" defense includes situations where the threat is to the disabled individuals themselves. As a result, the Ninth Circuit has drawn the most narrow exception possible for employers to justify safety-based standards under the ADA.

permanently removed employees from "safety-sensitive, little-supervised positions" if the individual had undergone treatment for substance abuse. *Id.* at 872. The court held that Exxon was not limited to the "direct threat" defense, but could defend its policy as a valid "qualification standard" so long as the requirement was job-related under Section 12113(a). *Id.* at 875. Thus, in the Fifth Circuit, in addition to the "direct threat" defense, employers can assert that a safety-based standard precludes liability when it is "job-related and consistent with business necessity." 42 U.S.C. § 12113(a) (2001). And, as that court noted, the difference between the two is material. *See Exxon*, 203 F.3d at 875. *See also International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 193 (1991) (noting distinction between "bona fide occupational qualification" and "business necessity"). Indeed, safety-related standards have generally been held to be a legitimate concern of employers. For example, job-related safety standards have been held by this Court and others to suffice for purposes of the "business necessity" defense under Title VII. *See Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977) (emphasis added) ("[A] discriminatory employment practice must be shown to be *necessary to safe and efficient job performance* to survive a Title VII challenge."); *see also, Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1119 (11th Cir. 1993) (finding that "protecting employees from workplace hazards is a goal that, as a matter of law, has been found to qualify as an important business goal" under the "business necessity" defense of Title VII).

In contrast, the Ninth Circuit allowed that, barring the "direct threat" defense, Chevron could only apply its health standards if a particular physical condition amounted to an "essential [job] function" under Section 12111(8). *Echazabal*, 226 F.3d at 1071. Under this regime, Chevron's medical screening of applicants was fundamentally unsound under the ADA. That is, the Ninth Circuit's analysis of job qualifications in this case relates solely to Mr. Echazabal's physiological

ability to carry out the particular mechanical functions of plant helper. But the consequence of this holding is that the evaluation of health risks are rarely, if ever, valid under the ADA because health risks rarely constitute an "essential function" of a job. Indeed, the EEOC has taken the extreme and extremely peculiar position that safety-standards are almost never "essential." Thus, in *Equal Employment Opportunity Commission v. United Parcel Service, Inc.*, No. C 97-00961 WHA, 2000 U.S. Dist. LEXIS 18973 (N.D. Cal. Dec. 12, 2000), the court observed:

> The EEOC contends that ability to drive safely is not an essential job function for a truck operator. It says that driving is essential but driving safely is not. This argument is a necessary by-product of the EEOC's strategic view of the business-necessity defense . . . .

Id. at *115.

In addition, as noted above, the Ninth Circuit rejected the EEOC's position that the "direct threat" defense is applicable where placing a disabled individual in a particular job poses a threat to the disabled individual himself. *See* 29 C.F.R. § 1630.2(r) (2001). Yet other courts appear to have accepted such a defense at face value. *See, e.g., Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996) (upholding safety standard that barred applicant with hemophilia from position of firefighter, where evidence demonstrated that firefighters frequently suffered trauma injuries).

The problem created by these conflicts is clear. Employers are left in a quandary as to just what degree of connection is required between a safety standard and job performance in order to justify the application of a safety standard under the ADA. In the Ninth Circuit, safety standards are never legitimate unless an employer can show that the standard would present a direct threat of injury to third parties.

In contrast, in the Fifth Circuit, employers may either invoke the direct threat defense or, alternatively, show that a safety standard is job-related and consistent with business necessity, which, as stated above, is an entirely different legal standard. *See also Exxon*, 203 F.3d at 875. This Court should grant the Petition for Writ of Certiorari to determine when employers may properly consider safety standards in employment decisions under Title I of the ADA.

II

THIS COURT SHOULD GRANT THE PETITION TO ESTABLISH REASONABLE LIMITS ON THE OBLIGATIONS OF EMPLOYERS SO THAT THE ACT SERVES ITS INTENDED GOAL OF ELIMINATING INVIDIOUS AND IRRATIONAL DISCRIMINATION AGAINST THE DISABLED

The fundamental mandate of the Occupational Safety and Health Act (OSHA) states:

> (a) Each employer—
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . . .

29 U.S.C. § 654 (2001). Further, in the State of California, where the Chevron plant is located:

> No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful.

Cal. Lab. Code § 6402 (2001). Consistent with these policies, the EEOC adopted a regulation which allows employers to defend adverse employment actions against disabled individuals where that individual poses

> a significant risk of substantial harm *to the health or safety of the individual* or others that cannot be eliminated or reduced by reasonable accommodation.

29 C.F.R. § 1630.2(r) (2001) (emphasis added).

Yet, notwithstanding these provisions, the Ninth Circuit held that the ADA requires employees to hire disabled individuals even when the job in question will create acute health hazards to the disabled individual. Thus, while OSHA and state law demand that employers take affirmative steps to watch out for the health and safety interests of its able-bodied workers, and EEOC regulations similarly allow employers to consider the safety and well-being of disabled workers, the Ninth Circuit interpreted the ADA to require employers to ignore these concerns. This is an unreasonable way to interpret the ADA.

In drafting the ADA, Congress was focused on two concerns: physical barriers to the full participation of the disabled in mainstream economic life, and social barriers in the form of prejudices and ignorance. Congress found:

> [I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals *and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals* to participate in, and contribute to, society . . . .

42 U.S.C. § 12101(a)(7) (2001) (emphasis added). In short, the ADA was intended to enforce a regime that would eradicate

irrational discrimination based on presumptions about the capabilities of disabled individuals.

But the Ninth Circuit's holding requires more than that employers eschew mistaken notions about the abilities of disabled individuals, or eliminate barriers which can be overcome by reasonable accommodation. Chevron's employment decision regarding Mr. Echazabal was not based upon assumptions or myths, but was based on a factual assessment of his physical condition vis-a-vis the particular job to which he aspired. In the interest of safeguarding its employees' health, Chevron employed a policy of barring those with particular health conditions from undertaking positions in which those conditions presented unusual health risks. But according to the Ninth Circuit, employers may not consider such factors under the ADA because the ADA bars such "paternalistic" interests. *See Echazabal*, 226 F.3d at 1068-69.

There is evidence that Congress believed that "employment decisions must not be based on paternalistic views about what is best for a person with a disability." H.R. Rep. No. 101-485(II), at 74 (1990), *reprinted at* 1990 U.S.C.C.A.N. 303, 356. However, there is a distinction between paternalism, in which decisions are based on generalized presumptions of what might be best for a group of individuals, and frank assessment of the well-being of a particular individual in the execution of his or her job. Thus, unlike *Johnson Controls*, which involved an employer policy barring all women of child-bearing age from holding positions involving exposure to lead out of fear that lead exposure might harm any potential fetuses, this is not a case in which an employer applies an across-the-board safety standard that bars a discrete group of individuals, as a class, from a job because of a potential but remote risk of injury. *See Johnson Controls*, 499 U.S. at 196. While the standard in *Johnson Controls* could legitimately be labeled "paternalistic," in that it was based on general assumptions about what is best for all women, the same

cannot be said where the standard applied is based on an actual and particularized evaluation of the health risks involved in a job and the physical condition of a specific job candidate. In this case, Chevron made an individualized assessment of Echazabal's actual health conditions and an actual assessment of the specific conditions of the position he desired. This is not "paternalism"; this is prudence and conscientiousness. As one court explained the distinction:

> Pernicious myths and prejudices about disabilities often infect employment decisions where an employer regards an individual as having an impairment that renders him unsuited for a wide class or broad range of jobs. The same cannot be said of cases where, as here, an employer makes a decision by focusing sharply on whether there is a match between a particular job and an individual with an actual impairment, given the current state of medical knowledge about the impairment. Science, not myths and prejudices, underlie such a decision; it is a rational decision, not an irrational one. Put another way, the ADA seeks only to remedy perceived disabilities "that, like actual disabilities, extend beyond [the] . . . isolated mismatch of [a particular] employer and employee."

Serrano v. County of Arlington, 986 F. Supp. 992, 997 (E.D. Va. 1997) (citation omitted).

Congress did not intend the ADA to bar employers from applying prudent and reasonable measures designed to enhance and safeguard worker safety. For example, the House Report specifically noted that the ADA was not intended to undermine OSHA standards:

> The OSHA lead standard, for example, requires that employees exposed to lead be tested periodically to determine the lead level in the employee's blood. If the test shows that lead levels exceed thepermissible norm, the employee must be transferred from the exposed workplace to another worksite until the lead level falls below the permissible level. At that point, the employee may return to the original work station.

H.R. Rep. No. 101-485(II), at 74-75, *reprinted at* 1990 U.S.C.C.A.N. at 357. While OSHA may have no regulation directly relevant to Echazabal's situation, it is rather ironic that an OSHA regulation would require employers to minimize the health risks for lead exposure, but that the ADA requires an employer to affirmatively *ignore* a known health risk for an individual with a liver problem exposed to liver-toxic chemicals.[3]

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[3] One matter neither party has discussed is the issue of "reasonable accommodation," presumably because there is no way to avoid exposure to liver-toxic substances in the job for which Mr. Echazabal applied. However, if Chevron were required to hire Mr. Echazabal as a plant helper despite the health risks imposed by his disability, he would seem to be further entitled to "reasonable accommodation" of that disability—including transfer out of the plant helper position. Thus, a House Report explaining the term "reasonable accommodation" used the example of a painter with a severe allergy to a particular paint, stating that he would be entitled to the "reasonable accommodation" of job reassignment if his position entailed exposure to that paint. *See* H.R. Rep. No. 101-485(III), at 29 (1990), *reprinted at* 1990 U.S.C.C.A.N. 445, 451-52. This further underscores the unreasonable results that would flow from the Ninth Circuit's rule that employers must allow disabled individuals to assume the risk of injury. By its terms, the ADA requires that employers enable qualified disabled individuals to *avoid* risks associated with their disability.

In enacting Title I of the ADA, Congress repeatedly referred to its broad overall goal of eradicating irrational or unintentional discrimination against the disabled where simple measures could be taken to enable disabled individuals to participate in mainstream economic life. Congress referred to the fact that the ADA was designed to compensate for

> discrimination [that] often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies.

H.R. Rep. No. 101-485(II), at 30, *reprinted at* 1990 U.S.C.C.A.N. at 311. *See also*, *id.* at 33, *reprinted at* 1990 U.S.C.C.A.N. at 315; *id.* at 40, *reprinted at* 1990 U.S.C.C.A.N. at 322; H.R. Rep. No. 101-485(III), at 45, *reprinted at* 1990 U.S.C.C.A.N. at 468. Here, there is no contention or even suggestion that Chevron's application of its health standards to Mr. Echazabal was due to any consideration beyond Chevron's legitimate, sound, and sensible concerns for the general safety of its employees.

It would not serve the purposes of the Act and, indeed, would undermine numerous state and federal laws that reflect a broad public policy interest in advancing employee and public health and safety, for courts to adopt an interpretation of the ADA under which employers could not properly consider worker safety in filling jobs with disabled individuals. This Court should grant the Petition for Writ of Certiorari to reverse the decision of the court below and establish that legitimate worker safety qualifications are permissible under the ADA.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court should GRANT the Petition for Writ of Certiorari.

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Respectfully submitted,

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